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September 12, 2016

Arizona Corporation Commission

DOCKETED

SEP 12 2016

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007-2996

DOCKETED BY 

RE: Subpoenas dated August 25, 2016
Docket Nos. E-01345A-16-0036 and E-01345A-16-0123

Attached please find an objection to the above-referenced subpoena that was provided to Commissioner Robert Burns on September 9, 2016.

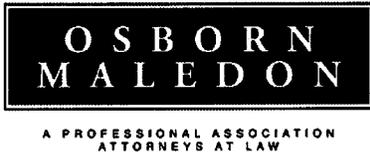
Sincerely,



Kerri A. Carnes

KC/bgs

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September 9, 2016

VIA REGULAR AND ELECTRONIC MAIL

Commissioner Robert Burns
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007-2996

Re: Subpoenas served August 26, 2016

Commissioner Burns:

I write on behalf of Arizona Public Service Corporation and Pinnacle West Capital Corporation (collectively the "Companies"). The Companies have received the above-referenced subpoenas. This letter serves as a formal objection to both subpoenas under Arizona Rule of Civil Procedure 45(c)(5).

The subpoenas suffer from numerous procedural and substantive defects, each of which is fatal. These defects include that the subpoenas (i) seek information irrelevant to its stated purpose; (ii) are not properly authorized by the Arizona Corporation Commission as a whole; (iii) impose an undue burden on the Companies; (iv) are vague and ambiguous; (v) seek information protected by the First Amendment of the United States Constitution; (vi) seek to make public confidential information; and (vii) improperly command the testimony of a specific corporate officer without regard for whether that officer is the appropriate custodian of record. Certain objections are briefly described below.

Notwithstanding these defects, and without waiving any rights to contest the subpoenas, APS will produce a significant amount of documents identified in the subpoenas. The subpoenas call for the specified documents to be produced on September 15. On that date, APS will produce all non-confidential documents in its possession that are responsive to the subpoena. Further, APS will produce any remaining responsive documents in its possession that are confidential after an appropriate confidentiality agreement is signed.

In addition to this Objection, filed concurrently with the delivery of this letter are the Companies' Motion to Quash or Cede Jurisdiction and Motion to Sever, which the Companies have filed with the Arizona Corporation Commission; and a Complaint for Declaratory Judgment, an Application for Preliminary Injunction, and an Application for Order to Show Cause, which the Companies have filed with the Maricopa County Superior Court. Courtesy copies of these filings are attached to this letter as Exhibits A, B, C, and D respectively.

FIRST AMENDMENT OBJECTION

The First Amendment of the United States Constitution offers broad protections that extend not just to speech, but also to the right to associate with whom you choose. This right “protects political association as well as political expression.”¹ Importantly, the right to political association includes association through financial contribution to political activities or organizations.² And the First Amendment protects against the closely-related interest in anonymous political speech.

The subpoenas purport to compel the disclosure of, among other protected information, independent political expenditures that Pinnacle West may have made from 2011-2016. They selectively target APS and Pinnacle West for this disclosure; no other entity is being asked to provide such information. But even if the case law concerning generally applicable disclosure laws were applied, the subpoenas’ demands could not survive the “exacting scrutiny” standard.³ This standard requires that (i) the disclosure requirement be justified by a sufficiently important governmental interest; (ii) the strength of the governmental interest reflect the seriousness of the actual burden on First Amendment rights; and (iii) that the governmental interest have a substantial relation to the disclosure requirement. The subpoenas cannot meet this standard.

The subpoenas purport to seek disclosure as part of an investigation into whether “APS has used ratepayer funds for political, charitable or other expenditures.” There is no allegation of any illegal conduct, or any other claim that impropriety or undue influence has occurred. Instead, the subpoenas seek information about how APS used “ratepayer funds.” The pursuit of this information, however, could never justify an investigation into Pinnacle West’s activities. Moreover, the determination of whether and how APS uses “ratepayer funds” is entirely assessed through the regulatory framework, and in particular, using the test year and “above-the-line”/“below-the-line” concepts described below. It is impossible, as a matter of the governing regulatory ratemaking principles, for any expenditure made by APS outside of a test year to impact what “ratepayer funds” are collected for, much less expenditures made by the wholly distinct Pinnacle West. As a result, the subpoenas are flawed because, among other reasons, the burdens they impose on speech are not related to the purpose of the subpoenas.

RELEVANCE OBJECTION

The letter enclosing the August 26 subpoenas indicated that the purpose of the subpoenas is to determine whether “APS has used ratepayer funds for political, charitable or other expenditures.” Given this governing standard for relevance, the subpoenas far exceed what could conceivably be needed to determine this issue because they seek information regarding expenditures that did not occur during a test year, and expenditures that would have occurred “below-the-line.” Both of these core principles of electric utility ratemaking are almost universally adopted by public utility commissions across the country, and both have been

¹ *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (citations omitted).

² *Id.* at 65.

³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366-67 (2010).

adopted by the Arizona Corporation Commission. Perhaps more importantly, these principles—principles with which you are certainly familiar—are critical to assessing the scope of what is relevant for these subpoenas.

The first ratemaking principle is that the expenses permissibly included in rates are only those expenses that occur during a test year. Rate cases involve, among other items, assessing the amounts that utilities receive and spend during a test year. This assessment contributes to an overall determination regarding the amount of revenue being received by the utility in question. Once that determination is made, rates are set accordingly. Subsequently, utilities are required to provide the same level of service to all of its customers based on this amount of revenue. How the utility spends revenue to fulfill this responsibility is left to the utility itself. Thus, rates are set based on what occurred during the test year, and what occurs outside of a test year is essentially irrelevant for purposes of determining the utility's rates.

The second ratemaking principle concerns what is “above” and “below” the line. As you surely know, regulated utilities receive almost all of their revenue from customers. But that does not mean, of course, that all of these utilities' expenses are paid for out of “ratepayer funds.” Instead, whether an expense is funded by customers is determined by whether that expense falls “above the line” or “below the line.” This demarcation is used by all regulated utilities across the country. It is also the framework used by the Arizona Corporation Commission. Indeed, you have voted on several matters that involved considering whether expenses fell above or below “the line.”⁴

If an expense is “above the line,” it is an operational expenditure that can be included in rates if it occurs during a test year. These are the only expenditures that can be said to be “ratepayer funds.” If an expenditure is “below the line,” however, it cannot be included in rates, even if it occurs during a test year. Expenditures that are not included in rates cannot be said to be paid from “ratepayer funds.”

Reviewing the information sought in the subpoenas in light of these principles makes clear that most of the information sought by the subpoenas is irrelevant to their stated purpose. APS's last test year was 2010 and its current test year is 2015. Above-the-line expenses made by APS during those years are relevant to ratemaking, and the issues of whether and how customer funds are used. All other expenses, including those made by APS in 2011-2014, or made by Pinnacle West in any year, cannot—as a matter of the regulatory ratemaking framework with which you have been intimately involved and have acted upon to set rates for millions of Arizonans for nearly four years—be comprised of “ratepayer funds.” Given the stated scope of relevance for the subpoenas, any item of information or document that does not involve test year expenditures by APS is categorically irrelevant.

⁴ See, e.g., In the Matter of the Reorganization of UNS Energy Corp., Docket No. E-04230A-14-0011 (2014); In the Matter of the Application of the Estate of William F. Randall D/B/A Valle Verde Water Co. for a Permanent Rate Increase, Docket No. W-01431A-13-0265 (2014); In the Matter of the Application of Indiada Water Co., Docket No. W-02031A-10-0168, et. al. (2012).

AUTHORIZATION OBJECTION

The subpoenas were submitted under the auspices of Article 15, Section 4 of the Arizona Constitution, A.R.S. §§ 40-241, -243, and -244, as well as Arizona Rule of Civil Procedure 45. All but the first two are not sources of authority, but instead rules on how to act on authority derived from other areas of the law. A.R.S. § 40-241 is clear that “[t]he commission, each commissioner, and person employed by the commission may ... inspect the accounts, books, papers and documents of any public service corporation.” However, nowhere does A.R.S. § 40-241 authorize a Commissioner to force a public service corporation to provide written answers to questions. Moreover, Section 40-241 must be read together with A.R.S. § 40-102(C), which makes clear that the powers granted under Section 40-241 may be exercised only in connection with an “investigation, inquiry or hearing” authorized by the Commission. As for Article 15, Section 4 of the Arizona Constitution, that provision lacks any language clearly imbuing an individual commissioner with the authority to conduct investigations without Commission authorization. Instead, this constitutional provision grants investigatory powers to “The corporation commission, and the several members thereof...”⁵ No court has interpreted this language, and it is at best ambiguous.⁶

Such an interpretation is dangerous and should be rejected for obvious public policy reasons. The interpretation in question would permit any individual commissioner—*acting alone without any input from the remaining commissioners, at any time, and for what appears to be any reason*—to seek any document or information from *any publicly-traded company doing business in Arizona*. If this is the law, it would pose a significant deterrent for any publicly-held company doing business in Arizona, from Google to Apple to Pinnacle West, to move to, expand operations in, or even stay in Arizona. Strong policy reasons militate against this interpretation, and they merit careful consideration.

CONFIDENTIALITY OBJECTION

The letter accompanying the subpoenas further indicated that all documents provided under the subpoenas would be made public. Although certain categories of documents sought from APS are publicly available, other categories are not. As you know, Arizona law provides that non-public information provided to the Commission by a public service corporation must be kept confidential:

No information furnished to the commission by a public service corporation, except matters specifically required to be open to public inspection, shall be open to public inspection or made public except on order of the commission entered

⁵ Article 15, Section 4, Arizona Constitution.

⁶ Although Arizona Attorney General Opinion No. 116-006 interpreted this constitutional language as contemplating an individual commissioner, it did so in conclusory fashion and is not binding. *Green v. Osborne*, 157 Ariz. 363, 365 (1988) (holding that Arizona Attorney General Opinions “are advisory only and do not bind courts of law, and they are not a legal determination of what the law is at any certain time.”).

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after notice to the affected public service corporation, or by the commission or a commissioner in the course of a hearing or proceeding.⁷

The law also provides penalties for any violation of this protection.⁸ That the subpoenas seek confidential information from APS is not itself a separate defect of the subpoena. The additional effort to immediately make public all confidential information received under the subpoenas, however, is unlawful and improper.

CONCLUSION

As noted, APS will produce relevant, responsive, and non-confidential documents in its possession on September 15. Please contact my office to coordinate the execution of an appropriate confidentiality agreement for any remaining non-public documents in APS's possession. Thank you.

Sincerely,



Mary R. O'Grady

MRO:pln

⁷ A.R.S. § 40-204(C).

⁸ A.R.S. § 40-204(D).

EXHIBITS

Exhibits referenced herein
have been provided directly
to Commissioner Burns